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In the Supreme Court of the United States

OCTOBER TERM, 1953

No. —

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

MID-CONTINENT PETROLEUM CORPORATION

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Acting Solicitor General, on behalf of the National Labor Relations Board, prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Sixth Circuit entered on May 22, 1953, denying enforcement of an order issued by the Board against Mid-Continent Petroleum Corporation.

OPINIONS BELOW

The opinion of the court of appeals (R. 59-74) is not yet reported. The findings of fact, conclusions of law and order of the National Labor Relations Board (R. 49-58) are reported at 99 NLRB 182.

JURISDICTION

The judgment of the court below was entered on May 22, 1953 (R. 59). The jurisdiction of this Court is invoked under Section 10(e) of the National Labor Relations Act, as amended, and under 28 U.S.C. 1254.

QUESTION PRESENTED

After an election wherein a majority of respondent's employees in an appropriate bargain unit selected a union as their collective bargaining representative, the Board certified the union as such representative. Within two months after the certification issued, three of the six employees in the unit, without any unfair labor practices on respondent's part, notified respondent that they did not want the union or any other labor organization to represent them and respondent thereupon refused further to deal with the union. The question is whether, in these circumstances, the Board was entitled to hold that the employer was required to continue to bargain collectively with the union.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C., Supp. V, 151, *et seq.*) are set forth in the Appendix, *infra,* pp. 13-17.

STATEMENT

The National Labor Relations Board's findings and conclusions are based upon facts stipulated by the parties (R. 52-56, 42-47). They may be briefly summarized as follows:

Pursuant to a consent election conducted by the

Board's Regional Director on March 2, 1951, in an appropriate unit consisting of the six truck drivers at the Terre Haute, Indiana, bulk plant of respondent, Mid-Continent Petroleum Corporation, the drivers, by a vote of four to two, selected the Union (Teamsters, Chauffeurs, Warehousemen and Helpers, Local Union No. 144, AFL) as their bargaining representative. After the Regional Director, on behalf of the Board, on March 12, 1951, certified the Union as bargaining representative for employees in the unit, the Corporation entered into bargaining negotiations with the Union.

Thereafter one of the six truck drivers in the unit quit his job for personal reasons and on April 16, 1951, another employee was hired in his stead. Within the next ten days, the new employee and two others in the bargaining unit, without any intervening unfair labor practices by the Corporation, delivered to it separate letters stating in substance that they did not want the Union or any other labor organization as their bargaining representative. On May 14, 1951—about two months after the certification—the Corporation withdrew recognition from the Union on the ground that it no longer represented a majority of the six employees in the unit. The Corporation has, since that time, refused to recognize or bargain collectively with the Union as the exclusive representative of such employees, although the Union has requested it to do so.

The Board, following its settled rule that, in the absence of special circumstances, a certification of representatives must be honored for a reasonable

period (usually at least one year) following the certification, even though there may have been a repudiation of the certified union by the employees, held that the repudiation of the Union within two months after the certification had issued did not constitute such special circumstances within the certification year as to impair the Union's representative status (R. 54). The Board accordingly found that on and after May 14, 1951, the Corporation violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union as exclusive representative of employees within the appropriate unit (R. 54-55). It ordered the Corporation to cease and desist from the unfair labor practice found; upon request, to bargain with the Union; and to post appropriate notices (R. 56-58).

In setting aside and denying enforcement of the Board's order, the court below held that, after three of the six employees in the unit involved made it clear that they did not wish to be represented by the certified Union, the employer could not lawfully give effect to the Board's certification of the Union as the employees' exclusive bargaining representative. It held that nothing in the statute, either express or implied, or in its legislative history requires employees to be bound for a reasonable period of time or for any particular time to their choice of a bargaining representative and that effect must be given to the employees' revocation of authority of their certified bargaining representative whenever it is clear that a majority of the employees no longer desire that representative. In so holding, the court recognized that "the various

courts of appeals are in conflict" on this issue. (R. 60, 70-74.)

SPECIFICATION OF ERRORS TO BE URGED

The court below erred:

1. In ruling that a Board certification of bargaining representatives lapses whenever, without regard to the date of the certification, it is made clear that the union no longer represents a majority of the employees in the bargaining unit.

2. In failing to hold that, in the absence of special circumstances, a Board certification of bargaining representatives is effective for a reasonable period, usually at least one year, following the certification, even though an intervening change in the employees' determination to be represented by the bargaining agent may have occurred.

3. In ruling that respondent was not required to continue to honor the Board's certification of the Union as bargaining representative of the employees in question when it became clear two months after issuance of the certification that three of the six employees in the unit no longer wished to be represented by the certified Union.

4. In setting aside and refusing to enforce the Board's order.

REASONS FOR GRANTING THE WRIT

1. The decision of the court below is in square conflict with the decisions of at least four other courts of appeals. See *National Labor Relations Board* v. *Century Oxford Mfg. Corp.*, 140 F. 2d 541, 542 (C.A. 2), certiorari denied, 323 U.S. 714; *Na-*

tional Labor Relations Board v. *Botany Worsted Mills*, 133 F. 2d 876, 881-882 (C.A. 3), certiorari denied, 319 U.S. 751; *National Labor Relations Board* v. *Appalachian Electric Power Co.*, 140 F. 2d 217, 220-222 (C.A. 4); *National Labor Relations Board* v. *Ray Brooks*, 32 LRRM 2118 (C.A. 9).[1] In each of those cases, a majority of the employees within the appropriate unit, without any unfair labor practice on the part of their employer, indicated to their employer by letters or petition shortly after the certification of the union as their bargaining representative that they did not want the union to represent them. And in each of those cases the courts upheld the Board's long-established rule that employees, having formally selected a bargaining representative in a Board-conducted election, must, in the absence of unusual circumstances,[2] be held to their choice for a reasonable

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[1] See also other decisions of these courts as well as the courts of appeals for the first, fifth, seventh and eighth circuits cited in note 4, *infra*, which approved the Board's ruling that a bargaining relationship established by a Board certification of representatives must be honored for a reasonable time despite an alleged loss of majority status not caused by any unfair labor practice on the part of the employer. We do not list any of these cases as squarely in conflict with the instant case because the alleged loss of majority status was not clearly established or because, for some other reason, the cases may be distinguished from the instant case.

[2] The Board has found "unusual circumstances" to exist where the union representing the employees was dissolved (*Public Service Electric & Gas Co.*, 59 NLRB 325); where the bargaining representative transferred its affiliation from one international union to another, and the identity of the bargaining agent thereafter became doubtful (*Carson Pirie Scott & Co.*, 69 NLRB 935; *Jasper Wood Products Co., Inc.*, 72 NLRB 1306); and where the number of employees in the bargaining unit doubled or quadrupled within the certification year (*Westinghouse Electric & Manufacturing Co.*, 38 NLRB 404; *Celanese Corporation of America*, 73 NLRB 864).

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period.[3] This reasonable period, where there is no bargaining contract, has usually been held to extend for one year from the certification date and, where a contract has been made, the reasonable period has usually been held to extend until near the end of the contract period. *National Labor Relations Board* v. *Geraldine Novelty Co.*, 173 F. 2d 14, 16-17 (C.A. 2); N.L.R.B., *Fourteenth Annual Report*, 1949 (Gov't Print. Off., 1950), pp. 22-23.

2. The Board's rule rests upon the principle recognized by this Court in *Franks Bros. Co.* v. *National Labor Relations Board*, 321 U.S. 702, 705, and the courts of appeals both before and after the 1947 amendments to the Act, that "a bargaining relationship once rightfully established must be permitted to exist and function for a reasonable period in which it can be given a fair chance to succeed."[4]

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[3] The Board has held, however, that when the bargaining representative is selected other than through a Board-conducted election, the employees may repudiate it at any time, in the absence of employer unfair labor practices which may have influenced the repudiation. *Frigo Bros. Cheese Corp.*, 50 NLRB 464, 473; *Celanese Corporation of America*, 95 NLRB 664, 672. See also, *National Labor Relations Board* v. *Mayer*, 196 F. 2d 286, 289 (C.A. 5).

[4] For pre-amendment court of appeals cases, see *National Labor Relations Board* v. *Century Oxford Mfg. Corp.*, 140 F. 2d 541, 542 (C.A. 2), certiorari denied, 323 U.S. 714; *National Labor Relations Board* v. *Botany Worsted Mills*, 133 F. 2d 876, 881-882 (C.A. 3), certiorari denied, 319 U.S. 751; *National Labor Relations Board* v. *Appalachian Electric Power Co.*, 140 F. 2d 217, 220-222 (C.A. 4). Even the court below appeared to approve this principle. See *National Labor Relations Board* v. *Prudential Insurance Co.*, 154 F. 2d 385, 389 (C.A. 6); *National Labor Relations Board* v. *Grieder Machine Tool and Die Co.*, 142 F. 2d 163, 165 (C.A. 6), certiorari denied, 323 U.S. 724.

In only one case prior to the amendment of the Act, *National Labor Relations Board* v. *Inter-City Advertising Co.*, 154 F. 2d 244 (C.A. 4), did a court of appeals (one member dissenting) apparently hold to the contrary. But that court did not

This principle recognizes the necessity in a democratic scheme of representation of subordinating, for a time, shifts in employee sentiment in favor of a reasonable period of stability in employer-employee relations and thereby of attaining the statutory goal of industrial peace under collective agreements. This is but an adaptation of the rule "sanctioned by out governmental practices, by business procedure, and by the whole philosophy of democratic institutions" (*National Labor Relations Board* v. *Tower Co.*, 329 U.S. 324, 331, 332) which for a time subordinates shifts in the sentiment of the electorate in favor of stability in government. As the Court of Appeals for the Second Circuit has stated (*National Labor Relations Board* v. *Century Oxford Mfg. Corp.*, 140 F. 2d 541, 542-543, certiorari denied, 323 U.S. 714):

> The purpose of the act is to insure collective representation for employees, and to that end § 9 gives power to the Board to

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purport to reject its prior holding in the *Appalachian Electric* case, *supra*, and in denying a petition for rehearing, it stressed that its decision was confined to the "peculiar facts" of that case (unreported order of the U. S. Court of Appeals dated May 7, 1946, in Case Docket No. 5440). Subsequently, in *National Labor Relations Board* v. *Borchert*, 188 F. 2d 474, 475, enforcing in part 90 NLRB 944, that court again cited with approval its holding in the *Appalachian Electric* case.

For post-amendment cases, see *National Labor Relations Board* v. *Worcester Woolen Mills Corp.*, 170 F. 2d 13, 17 (C.A. 1), certiorari denied, 336 U.S. 903; *National Labor Relations Board* v. *Globe Automatic Sprinkler Co.*, 199 F. 2d 64, 69 (C.A. 3); *National Labor Relations Board* v. *Sanson Hosiery Mills*, 195 F. 2d 350, 352, 353 (C.A. 5), certiorari denied, 344 U.S. 863; *Superior Engraving Co.* v. *National Labor Relations Board*, 183 F. 2d 783, 792 (C.A. 7), certiorari denied, 340 U.S. 930; *National Labor Relations Board* v. *Ray Brooks*, 32 LRRM 2118 (C.A. 9); *National Labor Relations Board* v. *Borchert*, *supra*.

> supervise elections and certify the winners as the authorized representatives. Inherent in any successful administration of such a system is some measure of permanence in the results: freedom to choose a representative does not imply freedom to turn him out of office with the next breath. As in the case of choosing a political representative, the justification for the franchise is some degree of sobriety and responsibility in its exercise. Unless the Board has power to hold the employees to their choice for a season, it must keep ordering new elections at the whim of any volatile caprice; for an election, conducted under proper safeguards, provides the most reliable means of ascertaining the deliberate will of the employees.[5]

The Board's one-year certification rule was well known to Congress prior to the 1947 amendments of the Act,[6] and was approved by the Congress after the most careful deliberation. Indeed, "Section 9 (c)(3) of the amended statute, which proscribes the holding of more than one valid election in a bargaining unit or any subdivision thereof in a 12-month period, amounts in part to a codification of the Board's 1-year certification rule." N.L.R.B.,

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[5] None of the four cases from other circuits, on which the court below relies (R. 62-64), involved a Board-conducted election; in addition, at least some of these cases concerned repudiations after the lapse of one year. The Sixth Circuit is alone in adopting the view expressed in the decision below.

[6] The Board had reiterated this doctrine in its annual report to the President and the Congress the year immediately preceding the amendments to the Act, and for the year before that as well. N.L.R.B., *Twelfth Annual Report*, 1947 (U. S. Gov't. Print. Off. 1948), p. 13; N.L.R.B., *Eleventh Annual Report*, 1946 (U. S. Gov't. Print. Off., 1947), p. 17.

Thirteenth Annual Report, 1948 (U.S. Gov't. Print. Off., 1949), p. 31. In urging the adoption of Section 9(c)(3), its proponents expressed unequivocal approval of the Board's one-year rule, and favored its extension. Thus, Senator Taft explained that (93 Cong. Rec. 3838):

> The bill also provides that elections shall be held only once a year, so that there shall not be a constant stirring up of excitement by continual elections. *The men choose a bargaining agent for one year. He remains the bargaining agent until the end of that year.* [Italics supplied.]

And the Senate Report stated that (S. Rep. No. 105, 80th Cong., 1st Sess., 25):

> This amendment prevents the Board from holding elections more often than once a year in any given bargaining unit unless the results of the first election are inconclusive by reason of none of the competing unions having received a majority. At present, if the union loses, it may on presentation of additional membership cards secure another election within a short time, but *if it wins its majority cannot be challenged for a year.* [Italics supplied.]

These Senate statements confirming the Board's one-year certification rule are paralleled by the corresponding history in the House. The House bill prohibited more than a single valid election in the course of a year, *except upon the petition of employees requesting the decertification of a bargaining representative.* H. R. 3020, 80th Cong., 1st Sess., Secs. 9 (f) (7), 9 (c) (2) (April 11, 1947);

H. Rep. No. 245, 80th Cong., 1st Sess., 39. This provision was severely criticized on the floor of the House because it negatived "present law" by which "a certification is presumed to be valid for a reasonable period of time—normally a year." "This [proposed] provision," it was argued, since it permits employees to repudiate the representation within the certification year, "plays havoc with stability of relationships." 93 Cong. Rec. 3446-47; see also 93 Cong. Rec. 3528. To the extent that it permitted decertification within the certification year, the proposal was thereafter eliminated in conference, the House conferees explaining that the "conference agreement adopts the provisions of the Senate amendment." H. Conf. Rep. No. 510, 80th Cong., 1st Sess., 49. Thus, Section 9 (c) (3) retained the underlying principle that prompted its adoption by Congress, namely that "In order to impress upon employees the solemnity of their choice, when the Government goes to the expense of conducting a secret ballot, * * * elections in any given unit may not be held more frequently than once a year." S. Rep. No. 105, 80th Cong., 1st Sess., p. 12.

This combination of circumstances clearly invokes the principle of legislative ratification of prior administrative construction. The Board's one-year certification rule was well known; it had received uniform judicial approval; it was the object of explicit mention and approval in Congress; and Section 9 (c) (3) of the amended Act reflects its statutory embodiment and extension. Under these circumstances it is a fair assumption that Congress accepted the construction adopted by the

Board and approved by the courts. *National Labor Relations Board* v. *Ray Brooks*, 32 LRRM 2118 (C.A. 9); Cf. *National Labor Relations Board* v. *Gullett Gin Co.*, 340 U.S. 361, 365-366. See also, *National Labor Relations Board* v. *Wiltse*, 188 F. 2d 917, 923 (C.A. 6), certiorari denied, 342 U.S. 859; *National Labor Relations Board* v. *John S. Barnes Corp.*, 178 F. 2d 156, 161 (C.A. 7).

3. The question presented here is of fundamental importance in the operation of the Act. It is imperative that employers, labor organizations, and employees know in their dealings with each other whether a Board certification is operative for a reasonable period or whether employees may repudiate their representative at will.[7] None of these parties can be certain of the effect of a Board certification upon their rights and obligations under the statute unless the conflict of decisions on this question is resolved.

CONCLUSION

For the reasons stated, it is respectfully submitted that this petition for a writ of certiorari should be granted.

ROBERT L. STERN,
Acting Solicitor General.

GEORGE J. BOTT,
General Counsel,
National Labor Relations Board.

AUGUST, 1953.

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[7] During the fiscal year ending June 30, 1952, the Board issued 4960 certifications of representatives in units totaling approximately half a million employees. N.L.R.B., *Seventeenth Annual Report*, 1952 (U. S. Gov't. Print. Off., 1953), p. 5.

APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. Supp. V, 151, *et seq.*), are as follows:

RIGHTS OF EMPLOYERS

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

UNFAIR LABOR PRACTICES

Sec. 8.(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9 (a).

* * * * *

REPRESENTATIVES AND ELECTIONS

Sec. 9. (a) Representatives designated or

selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment:

* * * * *

(c) (1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in section 9 (a), or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in section 9 (a); or

(B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in section 9 (a);

the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be con-

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ducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

* * * * *

(3) No election shall be directed in any bargaining unit or any subdivision within which, in the preceding twelve-month period, a valid election shall have been held. Employees on strike who are not entitled to reinstatement shall not be eligible to vote. In any election where none of the choices on the ballot receives a majority, a run-off shall be conducted, the ballot providing for a selection between the two choices receiving the largest and second largest number of valid votes cast in the election.

* * * * *

PREVENTION OF UNFAIR LABOR PRACTICES

Sec. 10. * * *

* * * * *

(e) The Board shall have power to petition any circuit court of appeals of the United States (including the United States Court of Appeals for the District of Columbia), or if all the circuit courts of appeals to which application may be made are in vacation, any district court of the United States (including the District Court of the United States for the District of Columbia), within any circuit or district, re-

spectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. * * *

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to

have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith served upon the Board, and thereupon the aggrieved party shall file in the court a transcript of the entire record in the proceeding, certified by the Board, including the pleading and testimony upon which the order complained of was entered, and the findings and order of the Board. Upon such filing, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e), and shall have the same exclusive jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

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